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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte PAULETTE J. MILLER and PEGGY LEE ALLEN

Appeal 2007-4042
Application 10/713,494
Technology Center 3700

Decided: January 7, 2008

Before WILLIAM F. PATE III, HUBERT C. LORIN, and
JOSEPH A. FISCHETTI, *Administrative Patent Judges*.

WILLIAM F. PATE III, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF CASE

1 This is an appeal from the final rejection of claims 1-5, 9 and 11. Claims 6-8 and 12-18 have been withdrawn from consideration in response to a restriction requirement.

We have jurisdiction over the appeal pursuant to 35 U.S.C. §§ 6 and 134.

The claimed invention is directed to a bathing apparatus for use in a tub or sink.

Claim 1, reproduced below, is further illustrative of the claimed subject matter.

1. A bathing apparatus for use in a bathing vessel comprising:

a flexible sheet;

attachment means for attaching the flexible sheet to a surface of the bathing vessel such that the flexible sheet is substantially in contact with the bottom surface of the bathing vessel; and

connecting means removably connecting the attachment means to the flexible sheet.

REFERENCES

The references of record relied upon by the examiner as evidence of anticipation and obviousness are:

Kiester (Kiester '528) Des. 370,528 June 04, 1996

Stevens 6,353,943B1 March 12, 2002

A related reference referred to by Appellant is:

Kiester (Kiester '850) 5,491,850 February 20, 1996

REJECTIONS

Appeal 2007-4042
Application 10/713,494

Claims 1-5, 9 and 11 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Stevens.

Claims 1-5, 9 and 11 stand rejected under 35 U.S.C. § 103 as unpatentable over Stevens in view of Kiester '528.

FINDINGS OF FACT

The patent to Stevens is directed to a bathing mat for reducing slips and falls. The mat is comprised of a flexible sheet made of a flexible absorbent fabric which is removably affixed to the bathtub by an attachment means. As disclosed in Fig. 3, the attachment means can comprise a suction cup, or, as shown in Fig. 5, the attachment means could comprise hook and loop fasteners. As to the connection of the suction cup fasteners 54 to the flexible fabric mat 52, the post 75 of the suction cup 54 may be secured to the mat by any means known in the art. See column 4, line 35.

Accordingly, it is our finding that Stevens is suggestive of attaching the suction cups to the fabrics in the ways that structures are conventionally attached to fabrics such as snaps, Velcro™, safety pins, spring clips, etc.

Kiester '528 discloses a bathtub-mounted infant support. As shown in Fig. 3, suction cups are provided to attach the mat to the plumbing fixture. Fig. 5 discloses that the suction cups or attachment means are attached to the fabric or flexible sheet by connecting means comprising straps with snap fasteners.

According to Appellants, Kiester '850 discloses that Kiester '528 contemplates fastening the fabric above the bottom surface of the bathing vessel as in hammock fashion rather than the flexible sheet being fastened to the bottom of the bathing vessel. (Br., 11-12)

PRINCIPAL OF LAW

The prior art may anticipate a claimed invention, and thereby render it non-novel, either expressly or inherently. *In re Cruciferous Sprout Litig.*, 301 F.3d 1343, 1349 (Fed. Cir. 2002). Express anticipation occurs when the prior art expressly discloses each limitation (i.e., each element) of a claim. *Id.* In addition, “[i]t is well settled that a prior art reference may anticipate when the claim limitations not expressly found in that reference are nonetheless inherent in it.” *Id.*

A claimed invention is unpatentable if the differences between it and the prior art are “such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art.” 35 U.S.C. § 103(a) (2000); *KSR Int’l v. Teleflex Inc.*, 127 S.Ct. 1727 (2007); *Graham v. John Deere Co.*, 383 U.S. 1, 13-14 (1966).

In *Graham*, the Court held that that the obviousness analysis is bottomed on several basic factual inquiries: “[1] the scope and content of the prior art are to be determined; [2] differences between the prior art and the claims at issue are to be ascertained; and [3] the level of ordinary skill in the pertinent art resolved.” 383 U.S. at 17. *See also KSR Int’l v. Teleflex Inc.*, 127 S.Ct. at 1734. “The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *Id.* at 1739.

While there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness, “the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR* 127 S.Ct. at 1741.

When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability. For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill.

Id., at 1740 . We must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.

Id.

Appellant argues that there is no teaching, suggestion, or motivation (TSM) for the combination of references. However, in *KSR* the Supreme Court held that a rigid application of such a mandatory formula as TSM was incompatible with its precedent concerning obviousness. See *KSR* at 1741.

ANALYSIS

We will not sustain the rejection under § 102. It is unclear from the disclosure in Stevens whether Stevens contemplates a connecting means for removably connecting the attachment means to the flexible sheet. The examples that Stevens gives in column 4, line 37 such as heat fusion or ultrasonic welding seem to indicate a permanent attachment.

Contrary to the §102 rejection, we will sustain the obviousness rejection of all of the claims on appeal under § 103 as unpatentable over Stevens in view of Kiester ‘528. Kiester ‘528 clearly discloses the flexible sheet, the attachment means, i.e., suction cups, and the connecting means, i.e., the straps with snaps for removably connecting the attachment means to the flexible sheet. Stevens discloses placing the flexible mat against the surface of a bathing container for safety and comfort. Appellants argue that flexible sheet of Kiester ‘528 is not placed against the bottom surface of the bathing vessel. While this may be true, we note that Appellants’ claims are directed to an article. The article clearly lacks novelty over Kiester ‘528. The claimed contact with the bottom surface of the bathing vessel is simply an intended use and cannot serve to limit the article which is known in the prior art.

Additionally, we note that Stevens places her flexible sheet in contact with the surface of the bathing vessel. Stevens further discloses that her fabric maintains its safety properties when soaked with water. Col. 3, ll. 3-5. Furthermore, Stevens discloses that non-slip fabric mats attached to the floor of a bathtub are known in the prior art. Col. 1, ll. 26-30. Accordingly, Stevens is at least suggestive of placing a flexible fabric mat on the bathtub floor. Thus, it would have been obvious from the combined teachings of Stevens and Kiester ‘528 to attach a flexible fabric to a bathing vessel lower surface.

Finally, we note Appellants' argument that there is no teaching, suggestion or motivation (TSM) for combining Stevens and Kiester '528. As noted above, in *KSR*, the Supreme Court stated that a rigid application of a mandatory formula such as TSM was incompatible with its precedent concerning obviousness. Instead, we view the combination of the attachment and connection means of Kiester '528 with the safety panel that lies against a bathing vessel surface as in Stevens as simply combining prior art elements according to known method to yield predictable results. In this case, such a combination is likely to have been obvious. *See KSR* 127 S.Ct. at 1739.

CONCLUSION

The rejection of claims 1-5, 9 and 11 under 35 U.S.C. § 102(b) is reversed.

The rejection of claims 1-5, 9 and 11 under 35 U.S.C. § 103 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See 37 C.F.R. § 1.136(a)(1)(iv)(2007).*

Appeal 2007-4042
Application 10/713,494

AFFIRMED

vsh

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